



DEPARTMENT OF VETERANS AFFAIRS

8320-01

38 CFR Part 38

RIN 2900-AO95

Applicants for VA Memorialization Benefits

AGENCY: Department of Veterans Affairs.

ACTION: Proposed rule.

SUMMARY: The Department of Veterans Affairs (VA) proposes to amend its regulations defining who may apply for a headstone or marker. The intended effect of this proposed rule would be to expand the types of individuals who may request headstones and markers on behalf of decedents. This amendment would address concerns that the existing applicant definition is too restrictive and results in identified veteran gravesites going unmarked.

DATES: Comments must be received on or before [insert date 60 days after date of publication in the FEDERAL REGISTER].

ADDRESSES: Written comments may be submitted through [www.Regulations.gov](http://www.Regulations.gov); by mail or hand-delivery to the Director, Regulation Policy and Management (02Reg), Department of Veterans Affairs, 810 Vermont Ave., NW., Room 1068, Washington, DC 20420; or by fax to (202) 273-9026.

Comments should indicate that they are submitted in response to "RIN 2900-AO95 – Applicants for VA Memorialization Benefits." Copies of comments

received will be available for public inspection in the Office of Regulation Policy and Management, Room 1068, between the hours of 8:00 a.m. and 4:30 p.m. Monday through Friday (except holidays). Please call (202) 461-4902 for an appointment. (This is not a toll-free number.) In addition, during the comment period, comments may be viewed online through the Federal Docket Management System (FDMS) at [www.Regulations.gov](http://www.Regulations.gov).

FOR FURTHER INFORMATION CONTACT: Anita Hanson, Director, Memorial Programs Service (41B), National Cemetery Administration, 810 Vermont Ave., NW., Washington, DC 20420, (202) 501-3060. (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION: The National Cemetery Administration (NCA) proposes to amend its regulations regarding applications for headstones and markers. NCA is proposing, as discussed below, to amend the definition of “applicant,” set forth in 38 CFR 38.632, as it pertains to individuals requesting VA headstones and markers. In 2009, VA implemented the existing definition of applicant to include the decedent’s next of kin (NOK), a person authorized in writing by NOK, or a personal representative authorized in writing by the decedent. An individual who met the definition was authorized to apply for a Government-furnished headstone or marker, or a new emblem of belief for inscription on a Government-furnished headstone or marker.

VA has received a number of requests from individuals who did not meet the current definition of applicant for headstones or markers. Because of the

regulatory restriction, VA denied the requests for headstones or markers which has frustrated the efforts of individuals to ensure the unmarked graves of veterans, particularly those from historic eras, are appropriately marked. VA shares the goal of these individuals to ensure appropriate recognition of veterans who served the United States and proposes to revise the definition of applicant to ease the restrictive aspects of the definition and allow more individuals to apply for headstones and markers, including memorial headstones and markers.

We propose to place this revised definition in § 38.600(a). Section 38.600(b) contains other definitions that are used elsewhere in part 38, including the definition of one term that we intend to use in the revised definition of applicant, so putting all the definitions together is a logical step.

The revised definition of applicant recognizes that VA is authorized to provide two types of headstones or markers. Under 38 U.S.C. 2306(a), VA provides “appropriate Government headstones or markers...for the unmarked graves” of certain eligible individuals. Under section 2306(b), VA provides “an appropriate memorial headstone or marker for the purpose of commemorating an eligible individual whose remains are unavailable.” We do not believe we need to supply additional definitions of these items, since the statute has clearly identified the use for each, but for ease of identification in our regulations, we adopt the term “burial headstone and marker” for those items provided under section 2306(a) and “memorial headstone and marker” for those provided under section 2306(b).

We propose to recognize five categories of individuals who may submit requests for burial headstones and markers. In proposed § 38.600(a)(1), we would ensure that any family member can request a burial headstone or marker. We believe that burial and memorialization are among the most personal decisions that individuals make, and that family members generally make these decisions. However, as we have stated above, we understand that our current definition, which relies on the phrase “next of kin,” is too restrictive because it would not allow for extended relatives, such as fifth cousins and great-nieces or great-great-nephews, to request a headstone or marker for their relatives. We have chosen to use “family member,” and we provide clarification that this phrase would include the decedent’s spouse, or the child, parent, or sibling of the decedent, whether biological, adopted, or step relation. In addition, because we may receive requests to provide burial headstones and markers for veterans who served decades and even centuries ago, we would allow for requests from a lineal or collateral descendant of the decedent. This would allow families who have recently discovered the military service of an ancestor to apply for memorialization of their deceased relative.

In addition to family members, we are also proposing that “personal representatives” would be allowed to apply for headstones or markers. Currently, our regulation limits applications by personal representatives to those who are specifically authorized by NOK or the decedent. This has also been the source of many denied applications. We propose to continue to allow personal representatives to apply, but we update the regulation by using an existing

definition of the term contained in § 38.600(b). Our intent is to allow an individual who is responsible for the burial or memorialization of a deceased individual to apply for a headstone or marker. The current definition in § 38.600(b) requires the individual to identify himself or herself to an NCA cemetery director as "the person responsible for making decisions concerning the interment of the remains of or memorialization of a deceased individual." In addition to referencing the definition in § 38.600(b), we would update § 38.600(b) by removing the requirement that the individual notify a cemetery director of their responsibilities toward the decedent. Our current processing of applications for headstones and markers, and burial benefits as well, generally involves contact first with the National Cemetery Scheduling Office or the Memorial Programs Service, located in NCA's central office. The removal of "cemetery director" from this definition reflects the current practice. Use of the revised definition of personal representative would allow for application for headstones and markers not only by family members, but also by individuals who have no familial relationship to the veteran but to whom the responsibility for final disposition of the remains or other related activities have fallen. For example, a close friend or a fellow veteran who served with the decedent may be called upon to make final arrangements for a veteran with no living family members. We want to make it possible for this individual to request memorialization of the veteran. Similarly, groups such as the Missing in America Project have made a significant contribution to finding the unclaimed remains of veterans and ensuring that they are provided with a final resting place. It is a logical step that the same individual

who made the burial arrangements should be able to request memorialization as well. We note, however, that if these veterans are buried in a national cemetery, or in a state or tribal cemetery that has received a VA grant, no additional request for memorialization is necessary; a headstone or marker will be ordered as part of the burial process at all such cemeteries.

A particular type of personal representative, and one that we provide for separately here, is a congressionally chartered Veterans Service Organization (VSO). Because these organizations provide numerous activities in service to veterans and families of veterans, we would accept applications from a VSO for a headstone or marker to mark the grave of an eligible deceased individual.

We also propose, in § 38.600(a)(1)(iv), to accept applications from individuals who have authority under state or local laws to make final arrangements for decedents. As may be expected, states and localities have varying laws on this topic, and we cannot detail each variation. However, some examples include an individual who is appointed by a county within a state to arrange burial of homeless or indigent individuals, or someone to whom a court of competent jurisdiction has issued an order providing the individual with authority to arrange burial or memorialization. We also include in this group funeral home directors, crematory operators, or those responsible for the operation and maintenance of a cemetery, because their activities are regulated by state or local laws. Any individual who provides documentation of such lawful duty would be eligible to apply for a headstone or marker for an eligible deceased individual.

In proposed § 38.600(a)(1)(v), we would address applicants for burial headstones and markers for graves of veterans whose service ended prior to April 6, 1917, or on whose service prior to April 6, 1917, the eligibility of another individual for memorialization is based. We chose to use April 6, 1917, because it is the date on which the United States entered World War I. We are aware that many individuals are interested in researching genealogy, either for themselves or others, or have broad interest in researching military history, including the burial of veterans. We know that many individuals have taken up the task of identifying burial places of veterans to obtain for them a lasting memorial to their service. We applaud the efforts of these individuals and seek to recognize those efforts by allowing them to make an application if they identify an unmarked grave of an eligible individual. We believe that if the grave belongs to a veteran who served during World War I or later, it is more likely that a living family member (as defined in proposed paragraph (a)(1)) could be found. To ensure that family wishes are respected, we believe that an unrelated individual who identifies an unmarked grave of an eligible veteran who served during or after World War I should attempt to identify and contact family rather than making the application for a burial headstone or marker directly to VA.

Memorial headstones and markers, under section 2306(b), are distinct from burial headstones and markers and are authorized to commemorate an eligible individual whose remains are unavailable for burial. When an individual dies and is buried, the gravesite provides a place for family to gather to mourn and remember their loved one. The burial headstone or marker, particularly in a

national cemetery, offers the family a physical remembrance of the individual and of the contribution of a veteran to our country. When a family has no remains to bury, they have no similar place to mourn. The memorial marker provides such a location. We believe this is why Congress limited the availability of the memorial headstones and markers to locations in cemeteries. We are proposing to limit the definition of applicant for memorial headstones and markers to family members, with the same parameters for that term as discussed above, so that a memorial headstone or marker retains the same symbolism and purpose that a burial headstone would have. It is a commemoration of an individual, not the service of the individual. The nation honors the service of veterans in many ways; the memorial headstone or marker allows families to honor their loved one individually.

We also propose to make several technical corrections to current regulations necessitated by this rulemaking. First, we would update the introductory paragraph in § 38.600(b) to make the definitions that follow pertain to all of part 38. These definitions were placed in § 38.600(b) as part of a rulemaking that promulgated § 38.617 and § 38.618, which bar burial benefits for individuals who committed capital crimes. However, a few of the terms defined in § 38.600(b) are used elsewhere in part 38, including interment, memorialization, and notably, personal representative. As discussed above, we propose to use this term in § 38.600(a). In addition, making these definitions apply to all of part 38 is a step we are making in anticipation of a general rewrite of part 38. We anticipate adding other definitions to this paragraph in future rulemakings



designed to clarify our regulations and may consider relocation of the definitions in § 38.600, including the revised definition of applicant.

Second, as discussed above, we are proposing to remove the phrase “cemetery director” from the definition of personal representative in § 38.600(b), so that individuals may make themselves known to NCA in ways other than through the cemetery directors.

Finally, we propose to remove the phrase “a Government-furnished headstone or marker and, in appropriate instances,” from § 38.632(b)(1). The current regulation applies to applicants for headstones and markers and emblems of belief. We propose to remove the indicated language because the new definition we introduce in this rulemaking would apply to headstones and markers, and we propose to leave intact, at least for the present time, the definition of applicant in § 38.632 as it applies to emblems of belief (EOBs). We have received no negative feedback regarding use of this definition for EOBs. We may reconsider the definition in a future rulemaking as we rewrite part 38. We alert interested parties, however, that we are not accepting comments at this time on the definition of applicant as it pertains to EOBs. Such comments will be considered outside the scope of this rulemaking.

#### Effect of Rulemaking

The Code of Federal Regulations, as proposed to be revised by this rulemaking, would represent the exclusive legal authority on this subject. No contrary rules or procedures would be authorized. All VA guidance would be

read to conform with this proposed rulemaking if possible or, if not possible, such guidance would be superseded by this rulemaking.

#### Paperwork Reduction Act

This proposed rule contains no provisions constituting a collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3521).

#### Regulatory Flexibility Act

The Secretary hereby certifies that this proposed rule would not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601-612. This proposed rule directly affects only individuals and would not directly affect small entities. Therefore, pursuant to 5 U.S.C. 605(b), this rulemaking is exempt from the initial and final regulatory flexibility analysis requirements of 5 U.S.C. 603 and 604.

#### Executive Order 12866 and 13563

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, and other advantages; distributive impacts; and equity). Executive Order 13563 (Improving Regulation and Regulatory Review) emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting

flexibility. Executive Order 12866 (Regulatory Planning and Review) defines a “significant regulatory action,” requiring review by the Office of Management and Budget (OMB), unless OMB waives such review, as “any regulatory action that is likely to result in a rule that may: (1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) Raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in this Executive Order.”

The economic, interagency, budgetary, legal, and policy implications of this regulatory action have been examined, and it has been determined not to be a significant regulatory action under Executive Order 12866. VA’s impact analysis can be found as a supporting document at <http://www.regulations.gov>, usually within 48 hours after the rulemaking document is published. Additionally, a copy of the rulemaking and its impact analysis are available on VA’s Web site at <http://www1.va.gov/orpm>, by following the link for “VA Regulations Published.”

### Unfunded Mandates

The Unfunded Mandates Reform Act of 1995 requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before

issuing any rule that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more (adjusted annually for inflation) in any 1 year. This proposed rule would have no such effect on State, local, and tribal governments, or on the private sector.

#### Catalog of Federal Domestic Assistance

There are no Catalog of Federal Domestic Assistance numbers and titles for the programs affected by this document.

#### Signing Authority

The Secretary of Veterans Affairs, or designee, approved this document and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs. Jose D. Riojas, Chief of Staff, Department of Veterans Affairs, approved this document on September 18, 2014, for publication.

List of Subjects in 38 CFR Part 38

Administrative practice and procedure, Cemeteries, Claims, Crime,  
Veterans.

Dated: September 26, 2014.

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William F. Russo,  
Acting Director,  
Office of Regulation Policy & Management,  
Office of the General Counsel,  
U.S. Department of Veterans Affairs.

For the reasons set out in the preamble, VA proposes to amend 38 CFR part 38 as follows:

PART 38—NATIONAL CEMETERIES OF THE DEPARTMENT OF VETERANS AFFAIRS

1. The authority citation for part 38 continues to read as follows:

Authority: 38 U.S.C. 107, 501, 512, 2306, 2402, 2403, 2404, 2408, 2411, 7105.

2. Amend § 38.600 by:

a. Adding paragraph (a).

b. Removing “§§ 38.617 and 38.618” and adding in its place “part 38” in paragraph (b) introductory text.

c. Removing “cemetery director” from the definition of “personal representative” in paragraph (b).

The addition reads as follows:

§ 38.600 Definitions.

(a)(1) Applicant defined – burial headstones and markers. An applicant for a headstone or marker that will mark the gravesite or burial site of an eligible deceased individual may be:

(i) A decedent's family member, which includes the decedent's spouse; a child, parent, or sibling of the decedent, whether biological, adopted, or step relation; and any lineal or collateral descendant of the decedent;

(ii) A personal representative, as defined in paragraph (b) of this section;

(iii) A representative of a Congressionally-chartered Veterans Service Organization;

(iv) Any individual who is responsible, under the laws of the relevant state or locality, for the disposition of the unclaimed remains of the decedent or for other matters relating to the interment or memorialization of the decedent; or

(v) Any individual, if the dates of service of the veteran to be memorialized, or on whose service the eligibility of another individual for memorialization is based, ended prior to April 6, 1917.

(2) Applicant defined – memorial headstones and markers. An applicant for a memorial headstone or marker to commemorate an eligible individual must be a member of the decedent's family, which includes the decedent's spouse; a child, parent, or sibling of the decedent, whether biological, adopted, or step relation; and any lineal or collateral descendant of the decedent.

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§ 38.632 [Amended]

3. Amend § 38.632(b)(1) by removing "a Government-furnished headstone or marker and, in appropriate instances,".

[FR Doc. 2014-23330 Filed 09/30/2014 at 8:45 am; Publication Date: 10/01/2014]